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VIRGINIA BEACH

Convergence Center IV
 301 Bendix Road
 Suite 500
 Virginia Beach, VA 23452-1385
 (757) 497-6633
 Fax: (757) 497-7267
 www.wolcottroversgates.com

MANAGING LEGAL RISKS IN GREEN CONSTRUCTION

By: Marshall A. Winslow Jr., Esquire



AVOIDING BREACH OF CONTRACT CLAIMS

Construction of green buildings and green component systems offer many benefits such as reductions in the consumption and cost of both energy and water as well as an increasing number of governmental incentives. However, as green construction expands the legal risks expand with it given that there is no universal set of green building performance standards.

Owners, developers, architects, general contractors, subcontractors, suppliers and manufacturers have different roles, responsibilities and expectations so the best way to avoid risks associated with green construction is to have precise and tailored contract language. If a particular certification, code or regulation is required, you may want to include it as an exhibit to the contract to help define the scope of work or system performance.

Before signing a green construction contract, make sure to identify and fully understand the green obligations in terms of the means and methods to be used and factor that into the price. Identify any green component processes that may add time to the overall construction period and/or impact the build sequence. Find out if any of the green products to be used are in short supply or made to order and tailor the lead time and completion obligations accordingly. Be comprehensive in your approach to all contracts and make sure everyone understands the objectives. For example, if low volatile organic compounds (VOC) interior paint is required make sure the painting subcontractor knows it and understands why substituting a high VOC paint is not acceptable. If any green certifications are required, specify what they are, when they are to be determined, how they are determined (third party testing - if so by whom), their duration (is it a one-time certification or is it ongoing), and of course who is responsible for them. If it is ongoing, spell out demand/load parameters because you have no control over the occupant's usage of the building.

The available green building financial incentive programs are evolving, so you want to stay ahead of the curve when it comes to assessing potential liability for "green damages". For example, if you are the contractor and you build exactly per the architect's specifications, which turn out to be flawed, you want to protect yourself against "green damages" claims from the owner. Determine if a waiver of consequential damages clause is appropriate to address certain types of "green damages" claims such as loss of tax



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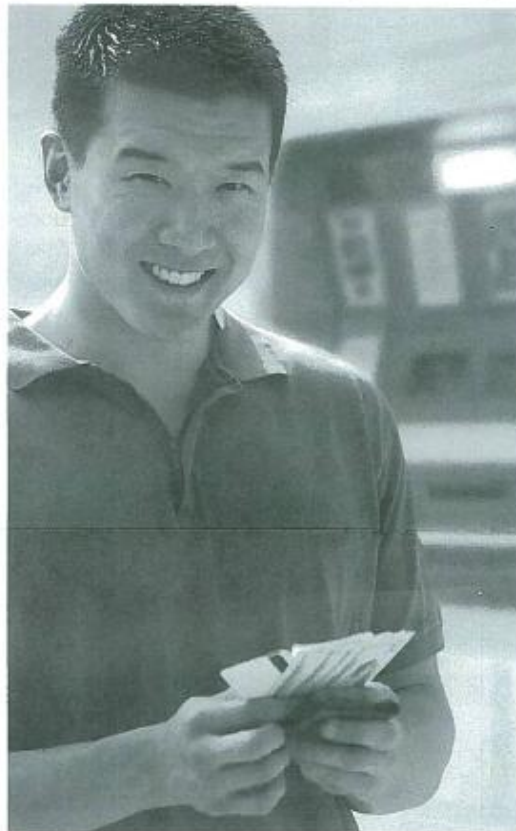
THE MAKING WORK PAY TAX CREDIT

Rebecca Pucheu, Esquire



The Making Work Pay Tax Credit was created by the American Recovery and Reinvestment Act of 2009, commonly known as the Stimulus Bill, and is in existence for 2009 and 2010. It provides a maximum of tax credit of \$400 for individuals and \$800 for married couples filing jointly. Taxpayers need to be aware of two characteristics of this credit.

First, the amount of Credit is adjusted for certain types and amounts of income. The Credit is decreased for individuals with modified adjusted gross income of more than \$75,000 or more than \$150,000 for couples that are married and filing jointly. The Credit does not apply to income from pensions, so taxpayers that only receive funds from a pension, and not any other earned income, will not receive the Credit. The Credit is decreased based on receipt of any Economic Recovery Payments, which could be provided if you received Social Security, Supplemental Security Income, Railroad Retirement or Veteran's benefits. The Credit is also adjusted based on whether you (or your spouse if filing jointly) received a Government Retiree Credit of \$250 as the credits cannot be given simultaneously.



Second, employers were instructed to automatically take this Credit out of an employee's paycheck and were given new withholding tables in order to calculate the employee's correct amount to withhold. Therefore, this Credit is different from other credits in that it is not likely to give individuals a bigger tax refund after filing taxes, but is used to increase an individual's income throughout the year. Individuals that are self-employed or work for an employer that failed

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EMOTIONAL INTELLIGENCE AND DECISION MAKING

C. Arthur Robinson, II, Esquire



In some instances, Lawyers are confronted with highly technical issues and have to parse obscure statutes in order to produce results. More often, however, it is skills that have less to do with technical interpretation and more to do with Emotional Intelligence that drive the work which we do for our clients

Emotional Intelligence, not to be confused with IQ, is the ability to accurately perceive the emotional state of others as well as determining your own emotional state and the ability to modify your own emotional state as well as the state of others. This skill is both more subtle and profound than you might first realize. Since the term Emotional Intelligence was coined some twenty years ago, there have been a number of studies that compare Emotional Intelligence with intelligence quotient to determine, on various objective measures, which is more determinative of a given set of outcomes. Unsurprisingly, Emotional Intelligence is far more important than intelligence quotient in determining positive outcomes.

If one thinks for just a second about the empirical studies which have been conducted, it becomes obvious why this is so. While people would like to think of themselves as rational decision makers, in fact, the decision making process, while elements of rational evaluation analysis are part of that process, is generally driven by the feelings, reactions, biases and point of view of the individual decision maker.



It is virtually always the case, when we represent clients; we are dealing with some fact pattern which elicits a strong emotional response. The emotion might be fear. The emotion might be anger or any of a number of other emotional responses. Seldom is there a problem to be solved or a matter to be dealt with which does not involve strong emotional drivers on the part of our clients. One critical element which we bring to the table, which is strongly correlated with intelligence quotient, is assisting clients in obtaining a more detached perspective, i.e. not to let the predominant emotion, which a fact pattern provokes, drive their decision making.

We analyze facts and study the law, but in large part, what we are assisting our clients in doing is dealing with that emotional response and in the face of that response, crafting a strategy which addresses both the factual concerns as well as providing an outcome which is either emotionally less painful or which provides for a more positive emotional response.

To the extent that what we do is driven by relationships with people and our ability to assist them in working through fact patterns and making decisions, the practice of law becomes an applied art in much the same way that psychologists assist individuals in evaluating and dealing with their emotional states.

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Unsurprisingly, similar skill sets, an ability to listen, an ability to consider carefully the reactions of the individuals with whom we speak and for whom we deal with various matters, is an integral part of the practice of law. At its most fundamental level, clients approach us to assist them in solving problems, maximizing opportunities and minimizing risks. All of these situations provoke emotional responses and it is important to factor in how a client deals with those responses to assist them with their legal matters. It becomes about the people as well as the matters. A clear understanding of how this dynamic works is part of everything we do.

C. Arthur Robinson, II, Esquire, practices in the areas of tax planning and reformation, tax sensitive transactions, estate planning and estate administration. Please call Mr. Robinson at 757-470-5551 if he can be of any assistance to you with the matters mentioned in this article or any other matter within his areas of practice.

**THE MAKING WORK PAY TAX CREDIT
CONTINUED**

to implement the Work Pay Tax Credit may claim the Credit on their 2009 (Form found here: <http://www.irs.gov/pub/irs-pdf/f1040sm.pdf>) and 2010 Tax Returns.

Finally, a taxpayer is required to fill out Schedule M of their Tax Return Form 1040 and claim the Credit even if their Credit was provided throughout the year in the form of a decreased withholding by their Employer. The unique aspects of this Credit can confuse anyone, but don't hesitate to ask your employer for help and use all of the resources that you have at your disposal, whether it be an online tool or professional assistance.

Rebecca Pucheu, Esq. concentrates her practice in Business Transactions, Bankruptcy and Estate Planning. Please call Ms. Pucheu at 757-497-6633 if she can be of any assistance to you with the matters mentioned in this article or any other matter within her areas of practice.

The attorneys of Wolcott Rivers Gates provide a full range of legal services to those who demand exceptional representation.

Regina F. Amick

W. Brantley Basnight, III

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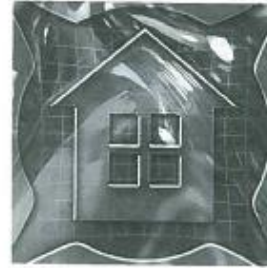
Leslie R. Watson

Marshall A. Winslow, Jr.

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Brandon H. Zeigler

MANAGING LEGAL RISKS IN GREEN CONSTRUCTION CONTINUED



deductions or loss of a below market interest rate if performance criteria are not met. Consider exclusions for design or construction alterations (change orders) that may adversely affect the performance of the building or any of the green components.

Make sure that any Guarantees and Warranties are very specific whether you are issuing them or receiving them. If you are the issuing party, try to limit them to performances within your control. Avoid making a manufacturer's product warranty your own by promising it yourself. If the manufacturer makes the warranty, specify that in writing because you don't have control over the manufacturing process. If you are issuing a warranty, consider using a clause limiting material and/or product warranty claims to those warranties offered by the manufacturers.

AVOIDING TORT CLAIMS

The combination of high buyer expectations, aggressive marketing of green building, and a lack of uniform green building standards is a recipe for confusion. Confusion creates a real danger of tort claims for negligence, misrepresentation and fraud. When it comes to advertising, avoid overreaching in marketing and representations. To minimize the risk of a negligence claim, always make sure to identify and follow the applicable codes and regulations that may apply to the means, methods and performance objectives of your work. Assess performance issues that may arise with integration of green and non-green components.

With regard to misrepresentation and fraud, the general rule is that statements of opinion are not actionable as fraud in Virginia. However, false statements of fact are generally actionable as fraud. For example, if something is advertised as "green", "sustainable", "energy efficient", or certified as such, make sure to set forth exactly what that means and what standard(s) you may be referring to. Does "sustainable" mean less maintenance? Whether you are a buyer or a seller, when in doubt spell it out in the contract. Also, avoid a blanket characterization of the structure as "green" and instead consider incorporating into the contract an inventory of green components together with performance information from the manufacturer. Sellers, don't make manufacturer warranties and guarantees your own with advertising.

Be wary of any new untested "green" products that do not have reliable performance data. Exercise due diligence to gather as much information as you can to evaluate a new technology.

Consider required maintenance procedures and costs. Consider a purchaser orientation program for proper operation and maintenance.

Be aware of the tort of Constructive Fraud which is defined as follows:

"A misrepresentation of a material fact, innocently or negligently made, with the intent that a person will rely on it and which that person relied upon with the result that he was damaged by it". (*emphasis supplied*) Va. Model Jury Instruction No: 39.040. That is why it is so important as a seller to attribute rating/certification promises to those who make them and not to make those promises your own in your advertising or your contracts. Don't promise the buyer what the product will do when you can just as easily say what the manufacturer promises the product will do. This should reduce the risk of a claim against you for misrepresenting the product or for defects in the product. The buyer should verify the source of any warranty or guarantee that is offered.

INSURANCE COVERAGE FOR GREEN LIABILITY

For buyers and sellers, you may want to determine if you can reduce your risk by checking with your insurance carrier to see if a green building endorsement is available to address issues that may arise due to changes in environmental standards, new construction, remodeling, repairs using green materials, loss of tax credits, loss of favorable interest rates and the like.

CONCLUSION

This brief topical outline merely scratches the surface of some of the issues that may arise, but I

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301 Bendix Road, Suite 500
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MANAGING LEGAL RISKS IN GREEN CONSTRUCTION CONTINUED

hope it is helpful to you as you navigate the uncharted territory of green construction liability. Given the lack of uniform standards, the evolving technologies and the expanding involvement of government at the federal, state and local levels, I anticipate that this will trigger a significant amount green building litigation over the rights and responsibilities of everyone involved. As you know, an ounce of prevention is worth a pound of cure, so please consult with an attorney about the various options available to minimize your legal risks both now and in the future.

Marshall A. Winslow, Jr. Esquire, concentrates his practice in the areas of civil litigation, construction, products liability, and eminent domain and is a member of the Green Building Council of the Tidewater Builders Association. He can be contacted at Convergence Center IV, 301 Bendix Road, Suite 500, Virginia Beach, VA 23452-1385, telephone 757-497-6633 or email at mwinslow@wolriv.com.